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DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-201093

DATE: JUL 15 1981

MATTER OF: George J. DiGiulio - Restoration of Forfeited Annual leave

DIGEST: Employee of Department of Navy scheduled 40 hours annual leave in writing for December 1979, but he forfeited 16 hours of such leave at end of 1979 leave year because he performed jury duty. He is entitled to have such annual leave restored since performance of jury duty constitutes an exigency of the public business under 5 U.S.C. § 6304(d)(1)(B) (1976). See 5 U.S.C. § 6322 (1976), which prohibits loss of or reduction in annual leave where employee is summoned to perform jury service.

The issue for determination is whether jury duty performed by an employee constitutes an "exigency of the public business" so as to allow restoration of forfeited scheduled annual leave. For the reasons stated below, we conclude that annual leave which is forfeited by an employee on those days when he performs jury service may be restored and credited to a separate leave account for his use.

Mr. Daniel K. Silverton, Business Manager, Local No. 2145, International Brotherhood of Electrical Workers (IBEW), appeals, on behalf of Mr. George J. DiGiulio, a civilian employee of the Mare Island Naval Shipyard, Department of the Navy, from the settlement action issued by our Claims Group, (Z-2822798), dated May 14, 1980. The settlement action denied the employee's claim for restoration of 16 hours of annual leave which he forfeited at the end of the 1979 leave year.

In March 1979, Mr. DiGiulio scheduled 40 hours of annual leave to be used between December 24 and 31, 1979, since he would accumulate 40 hours of annual leave in excess of the 240-hour ceiling which a Federal employee may carry forward into a new leave

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year. The leave was approved, in writing, by the employee's supervisor. However, Mr. DiGiulio was summoned to perform jury duty from December 11, 1979, through January 10, 1980. As a result, he was able to use only 24 hours of his 40 hours of excess leave prior to the end of the leave year. Thus, he forfeited 16 hours of annual leave.

During the period he served as a juror, Mr. DiGiulio was excused from performing his official duties and was granted paid court leave by the Department of the Navy under 5 U.S.C. § 6322 (1976). On February 1, 1980, Mr. DiGiulio made an application for restoration of his 16 hours of forfeited leave, supported by a statement from his supervisor that the leave had been cancelled because the employee was performing jury duty. The supervisor requested that the 16 hours of annual leave be restored and carried forward into the 1980 leave year.

In the administrative report dated April 14, 1980, the Commander, Mare Island Naval Shipyard, through his designated representative, stated that there is no authority under the law to restore Mr. DiGiulio's forfeited excess annual leave as there was no exigency or operational demand that would have prevented him from being excused from duty.

The IBEW, on behalf of Mr. DiGiulio, contends that the forfeited annual leave should be restored under the public exigency provision of the act of December 14, 1973, Public Law 93-181, § 3, 87 Stat. 705, 5 U.S.C. § 6304(d), since jury duty constitutes an "exigency of the public business." The union argues that a criminal trial is public business and that an exigency exists since a trial cannot be delayed to allow a juror to use annual leave.

Under 5 U.S.C. § 6304(a) or (b), an employee is limited to a maximum accumulation of either 30 or 45 days of annual leave and any excess leave at the beginning of the first full biweekly pay period occurring in a year will be forfeited. Prior to the enactment of

Public Law 93-181, December 14, 1973, 87 Stat. 705, leave which was forfeited by operation of 5 U.S.C. § 6304(a) or (b) could not be restored to the employee even if such forfeiture was the result of administrative error or was beyond the employee's control. However, this law added a new provision (5 U.S.C. § 6304(d)(1)) which permits forfeited leave to be restored if forfeiture resulted from; (a) an administrative error, or (b) exigencies of the public business when the annual leave was scheduled in advance, or (c) sickness of the employee when the annual leave was scheduled in advance.

With respect to employees summoned for jury service, 5 U.S.C. § 6322(a)(1) provides that a Federal employee is entitled to leave, without loss of, or reduction in, pay or leave to which he otherwise is entitled, during a period of absence with respect to which he is summoned, in connection with a judicial proceeding, by a court or authority responsible for the conduct of that proceeding, to serve as a juror. Further, the original statutory provision governing jury service by employees of the United States, the act of June 29, 1940, ch. 446, § 1, 54 Stat. 689, provided that the time involved in such jury service shall not "be deducted from the time allowed for any leave of absence authorized by law." We have stated that the purpose or intent of the statute in its entirety, is that an "employee of the United States shall receive his regular compensation or pay during the time he is absent on account of jury service, if otherwise in a pay status, and that the period of such service shall not in any event be charged as annual leave." 20 Comp. Gen. 276 (1940).

Subsequent to the enactment of Public Law 93-181 on December 14, 1973, this Office has not formally addressed the issue presented here, i.e., restoration of annual leave in the "use it or lose it" category which has been forfeited in circumstances where the employee has been summoned to perform jury duty. Clearly, prior to December 14, 1973, 5 U.S.C. § 6304(a)

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required the forfeiture of all annual leave credited to an employee at the close of a leave year which was in excess of the ceiling established, regardless of the reason for the employee's failure to use such excess annual leave. B-171947, April 7, 1972.

In two recent decisions involving the issue of exigency of the public business, this Office has allowed the restoration of annual leave in situations where there was a pressing need for the employee's services by his employing agency. Norbert A. Shepanek, 58 Comp. Gen. 684 (1979); William D. Norsworthy, 57 Comp. Gen. 325 (1978). In examining the legislative history of 5 U.S.C. § 6304(d) and the implementing guidelines contained in Federal Personnel Manual Letter No. 630-22, January 11, 1974, however, exigency of the public business is explained in terms of work requirements and situations where employees cannot be spared. See B-197957, July 24, 1980.

Thus, while it appears that exigency of the public business usually refers to the situation where an employee forfeits his annual leave because of a pressing need for him to perform work for his employing agency, there is no guidance in the legislative history of Public Law 93-181, in the regulations promulgated by the Office of Personnel Management, or in the decisions of this Office, as to whether jury service performed by a Federal employee constitutes an exigency of the public business.

However, turning our attention to the provisions of 5 U.S.C. § 6322(a)(1), we find a clear statutory pronouncement that prohibits the loss of, or reduction in, the annual leave of an employee during a period of absence where he is summoned to perform jury service. In the situation confronting Mr. DiGiulio, where the employee has properly scheduled the use of his annual leave in advance, but is unable to use such leave in the "use it or lose it" category because he is summoned to perform jury service, forfeiture thereof causes a loss of leave of absence authorized by law which is specifically prohibited by 5 U.S.C. § 6322(a)(1).

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The provisions of 5 U.S.C. § 6322 clearly recognize the performance of jury service by a Federal employee as being a matter of public necessity and of official concern to the Government. Further, it is the Office of Personnel Management's recommended agency policy that Federal agencies not ask that their employees be excused from jury duty except in cases of real necessity because of the well-recognized importance of trial by jury in the administration of justice in the United States. See Federal Personnel Manual, chapter 630, subchapter 10. We, therefore, conclude that jury service performed by a Federal employee under the previously discussed circumstances does, in fact, constitute an exigency of the public business. Accordingly, annual leave that is forfeited because of jury service may be restored under the "exigency of the public business" exception contained in 5 U.S.C. § 6304(d)(1)(B). We note that this result is in keeping with the intent of Congress when it enacted Public Law 93-181 to correct certain inequities where leave is lost through no fault of the employee. See H.R. Rep. No. 93-456, 93rd Cong., 1st Sess. 50 (1973).

Accordingly, the 16 hours of annual leave which were forfeited on those days when Mr. DiGiulio performed jury duty may be restored and credited to a separate leave account for his use. The settlement action of May 14, 1980, by our Claims Group, is overruled.

MILTON J. SOCOLAR

Acting Comptroller General
of the United States